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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. 349,

WILLIAM E. THORESEN, III,

Petitioner,

vs.

THE HONORABLE WILLIAM GOODWIN,

Respondent.

In re Petition of WILLIAM E. THORESEN, III.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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This is a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on June 19, 1968.

OPINIONS BELOW

The opinion-order of the Court of Appeals (Appendix A) is not yet reported. There was no opinion of the District Court except as expressed orally, and extracts from the oral observations are set forth in Appendix B, together with the docket entry.

JURISDICTION

The judgment of the Court of Appeals denying a certificate of probable cause in a habeas corpus case was entered on June 19, 1968. On June 24, 1968, petitioner sought leave to file an original writ of habeas corpus in this Court and a stay of related

criminal proceedings. Circuit Justice Douglas entered an order on June 25, 1968 (Appendix C), permitting the timely filing of a petition for certiorari and granting the motion for stay. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1). See *Burwell v. People*, 350 U.S. 10, 76 S. Ct. 31 (1955).

QUESTION PRESENTED

The ultimate question presented in this case is whether the writ of habeas corpus is available in any court, state or federal, to review the validity of a state criminal conviction obtained in violation of specific federal constitutional rights after the defendant has completely served his sentence or paid his penalty. The more immediate question in the instant case is whether the issue of alleged constitutional deficiency of a fully served prior state conviction can be raised by habeas corpus in the Federal District Court in which the defendant is charged with a federal offense which is dependent solely upon the prior state conviction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The statutes principally involved are 28 U.S.C. Secs. 2241(a), (c)(1)(2)(3), 2253 and 15 U.S.C. Sec. 902(e):

"§ 2241. Power to grant writ

"(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. . . .

* * * * * * *

"(c) The writ of habeas corpus shall not extend to a prisoner unless—

"(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

"(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

"(3) He is in custody in violation of the Constitution or laws or treaties of the United States; . . ."

"§ 2253. Appeal

"In a habeas corpus proceeding before a circuit or district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had. . . .

"An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of process issued by a State court, unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause."

"§ 902. Transporting, shipping, or receiving firearms or ammunition in interstate or foreign commerce; acts prohibited

* * * * * * *

"(e) It shall be unlawful for any person who is under indictment or who has been convicted of a crime punishable by imprisonment for a term exceeding one year or who is a fugitive from justice to ship, transport, or cause to be shipped or transported in interstate or foreign commerce any firearm or ammunition."

STATEMENT

This matter arises from the efforts of William E. Thoresen, III, to secure post-conviction review on constitutional grounds of a criminal conviction in a Maine state court. We have contended below that petitioner is experiencing a woeful tale of the law's delay through technicality; and we have brought to this Court the question of where and when this petitioner for habeas corpus can get a determination of his constitutional questions.

Petitioner was convicted of larceny in 1959 on a plea of guilty in a Maine trial court. The charge involved theft of what was in fact some $26.30 worth of travel posters from the Canadian National Railway's ferry terminal at Bar Harbor, Maine. He was put on two-year probation, which was completed in September of 1961. He is presently charged with violation of the Federal Firearms Act, 15 U.S.C. 902(e), the indictment alleging that, having

been convicted in Maine of a crime punishable by imprisonment for more than one year, he shipped firearms and ammunition in interstate commerce. It is this previous Maine conviction for which he seeks post-conviction review by habeas corpus.

Petitioner has sought to obtain habeas corpus review in the Maine state courts, in the federal courts of the First Circuit, and in the federal courts of the Ninth Circuit where the present criminal charge lies. In each case relief has been denied, not at any point on the merits, but solely because of jurisdictional objections to the availability of the writ.

A. *The Maine State and First Circuit Proceedings.*

Petitioner has consistently contended that the Maine conviction was based on a denial of his right to counsel under the Sixth Amendment to the United States Constitution, and additionally and independently, that his conviction was based upon a violation of his right to Due Process of Law under the Fourteenth Amendment in that the value of the property allegedly stolen had never in fact been ascertained by the prosecuting authorities and that as a result he was charged with and pled guilty to a crime of which he was not and could not be guilty.

Perhaps the best exposition of petitioner's claims is that set out in the First Circuit Court of Appeals' Opinion. (Appendix D). There the court found that: Petitioner was arrested in September, 1959 for stealing the six travel posters; was charged with "larceny of goods having a value in excess of one hundred dollars" (a felony-type violation);* and was jailed for want of bail. Between the date he was jailed and the date he entered a plea (a ten-day period), he was continuously in jail.

The facts relating to deprivation of counsel were stated by the court as follows:

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* The posters were subsequently arbitrarily assigned individual values by the prosecuting authorities aggregating $150.00 prior to the plea.

> "Petitioner employed an attorney, who in turn made contact with petitioner's father. Upon his arrival the father essentially discharged the attorney and conducted lengthy negotiations with the district attorney in the absence of counsel. The father brought with him funds sufficient to bail petitioner, but did not bail him. He informed the district attorney he was worried about petitioner and thought that he should be treated in a mental institution; that he did not want petitioner to know that this was the father's proposal, and that he did not want petitioner fined, but thought it best that he receive a suspended sentence and probation, as a result of which, if petitioner was released forthwith, he could return to his home in Illinois for treatment, but be under the custody of the court. After some difficulty the petitioner's father and the district attorney persuaded petitioner to plead guilty, the father informing petitioner that everything would be all right, and that he was only pleading to a 'misdemeanor type' offense." (Opinion, Appendix D).

Petitioner then entered a plea, received a two-year suspended sentence, and completed his probation in 1961.

The First Circuit went on to discuss the facts underlying petitioner's claims of a denial of Due Process. It found that, after petitioner was indicted in California in 1967, his then-counsel caused an investigation to be made of the circumstances surrounding the 1959 Maine conviction. Counsel's investigation revealed that:

> "the Canadian National Railway had paid a small sum for the posters in question, $2.25 apiece for five and some $15 for the sixth, from which it could fairly be said that by no possibility was the stolen property of a value in excess of $100. Accordingly, the larceny to which petitioner had pleaded should not have been so described, and petitioner was not in fact guilty of an offense within the ambit of section 902(e). [Federal Firearms Act]." (*Id.*)

After petitioner's counsel became informed of the foregoing, they immediately sought post-conviction relief in the Maine state courts, claiming that he had been denied his Sixth Amendment

right to counsel and Due Process of Law under the Fourteenth Amendment in the securing of the Maine conviction.

The Maine Supreme Judicial Court (affirming, see Appendix E for opinion of lower court) held that there is no post-conviction remedy in Maine available to review claimed deprivations of federal constitutional rights after a sentence is fully served. The Maine Supreme Judicial Court decision (Appendix F) has been brought here in the companion case of *William E. Thoresen, III v. State of Maine,* No. 203, October Term, 1968.

Petitioner then applied for a writ of habeas corpus in the Federal District Court in Maine, was denied relief (Appendix G), and applied for a certificate of probable cause to the First Circuit Court of Appeals which, sitting *en banc,* denied it. (See Appendix D).* The denials were purely on jurisdictional grounds.

B. *The California Proceedings.*

On June 28, 1967, petitioner was indicted under the Federal Firearms Act, this being dependent on the Maine conviction.** In the First Circuit opinion, there had been a broad suggestion by the court that petitioner was not remediless because he could raise the question of the validity of the Maine conviction as a defense to the criminal prosecution under the authority of *Burgett v. Texas,* 389 U.S. 109, 88 S. Ct. 258, 19 L. Ed. 2d 319 (1967). Therefore, on May 1, 1968, petitioner filed in the Northern District of California both an independent habeas corpus action and, in the alternative, a motion in the criminal case for a hearing under *Burgett* to determine the validity of the Maine conviction.

On May 7, 1968, the court denied both the petition for habeas

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* Petitioner has filed contemporaneously herewith a petition for a writ of certiorari to the First Circuit to review that court's decision.

** As part of the aftermath of this Court's decision in *Haynes v. United States,* —— U.S. ——, 88 S. Ct. 722 (1968), that indictment was dismissed and a new indictment was filed on March 6, 1968.

corpus and the application for a *Burgett* hearing, the judge declaring that he had no jurisdiction of the habeas corpus. He asserted that the only place the validity of the Maine conviction could be litigated was in Maine.*

On May 22, 1968, petitioner filed a notice of appeal in the habeas corpus proceedings and applied for a certificate of probable cause in the Ninth Circuit.** There followed some dispute as to whether the petition was premature, since the District Court had not yet formally signed an order denying the writ although, as the minutes showed, he had orally denied it. A three-judge panel of the Ninth Circuit Court of Appeals denied the petition for a certificate of probable cause without opinion on May 28, 1968 and, since there was the issue of prematurity, petitioner withdrew his notice of appeal so as to apply to the District Court for an indisputably final order denying the petition.

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* "THE COURT: Another reason why I wouldn't have jurisdiction is that the district court for the district in which that conviction was obtained is the court that has jurisdiction, and the judge in that district cannot transfer to me his responsibility to make a decision on a writ of habeas corpus. If that were allowed to happen can you imagine what would happen throughout these United States, if these petitions would be sent to other jurisdictions? How would I have an opportunity to hear all the factual background of all this without bringing people from Maine out here? I refuse to hear this petition for writ of habeas corpus here, absolutely. Whether the judge back there tries to send it to me or not, I just refuse to hear it.

* * * * * *

"THE COURT: (Interposing) I am going to agree with you, Counsel, that the federal rule will be that even though the question, we will use the word moot, arises long after the period of probation or term of the sentence, I will say that you could go in and literally erase the original conviction; but he can't do it here in front of me, because I am not assuming jurisdiction to make that determination. If you want to do it, you are going to do it back in Maine, but not here." (Transcript of May 7, 1968 hearing, pp. 61-62; 64-65).

** Petitioner has at all times preserved the question of whether a certificate is necessary under 28 U.S.C. § 2253. The statute requires a certificate when "the detention complained of arises out of process issued by a State Court." Here the immediate detention is federal, in California, but the assertedly unconstitutional detention was in Maine.

The matter thereupon came on again before the District Court on June 10, 1968;* both the habeas corpus matter and a renewed motion for a *Burgett* hearing were argued. The court again denied the writ (see Appendix B for court's reasoning), this time on the ground that the validity of the previous conviction was immaterial under the Federal Firearms Act; that is, he ruled that the Federal Firearms Act made it illegal to ship firearms in interstate commerce after a previous conviction whether the previous conviction was valid or invalid. (Appendix B).**.

Petitioner then filed a second petition for a certificate of probable cause in the Ninth Circuit; he has since filed a notice of appeal. This petition was in the alternative, seeking a writ of mandamus to require the District Judge to rule finally on the petition for habeas corpus if the Court of Appeals should construe the record as meaning that he had not yet ruled; or, in the alternative, if the order was regarded as final, for a certificate of probable cause for the appeal.*** The Court of Appeals thereupon denied the application for a certificate and, having treated the order as final, dismissed the mandamus petition, holding that although

> "petitioner is lawfully in custody charged with a federal crime and awaiting trial upon that charge . . . trial, and not habeas corpus, is the appropriate manner of resolving the issue of

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* These latter proceedings were at Fresno, California, in the Eastern District Court of California, the case having been transferred to that area because of prejudicial publicity.

** Thereupon defense counsel was allowed to make an offer of proof by calling the actual witnesses from Maine and Canada who were present in the courtroom. Each was allowed to affirm his affidavit, the general effect of which, if believed by the finder of fact, would be that there had been a denial of constitutional rights in the securing of the Maine conviction. However, the trial court refused to hear these witnesses and they were dismissed. (Copies of all of these affidavits and exhibits thereto are part of the record certified to this Court by the Ninth Circuit.)

*** The petition was thus given a double style in the Court of Appeals, first as a mandamus application and second as a petition for certificate of probable cause in a habeas corpus case.

guilt of the federal crime and subordinate issues relating to elements of the crime." (See Order, Appendix A).*

C. *Proceedings in this Court.*

As is apparent, the habeas corpus proceedings were entwined with the criminal proceedings.** Petitioner filed a motion for leave to file an application for an original writ of habeas corpus in this Court on June 24, 1968, and applied for a stay of his criminal trial which was to begin on June 25, 1968. On June 25, 1968, Justice Douglas entered an order staying the criminal trial "pending the timely filing of a petition for a writ of certiorari to review the judgment of the Ninth Circuit in the above-entitled case." (Order, Appendix C).

REASONS FOR GRANTING THE WRIT

The essential question in this case is whether anywhere in the entire legal order a person can obtain post-conviction review after he has served his sentence. This question was almost, but not quite, decided by this Court last term in *Peyton v. Rowe*, 390 U.S. ____, 88 S. Ct. 1549 (1968) and *Carafas v. Lavallee*, 390 U.S. ____, 88 S. Ct. 1556 (1968).

Petitioner exhausted his state remedies, and has been told that there is no Maine state remedy for post-sentence conviction review.*** He has exhausted his remedy in the obvious federal court, that for the Federal District of Maine, which has told him

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* By order dated July 9, 1968, the Court of Appeals directed the consolidation of the records in the two petitions to it so that the matter could come here as a single petition for certiorari on a single record.

** As the record shows, the trial court dealt with them simultaneously and interchangeably.

*** And, as petitioner alleges in his petition for certiorari to the Maine Supreme Judicial Court, if the Maine decision stands, and the federal circuit court decisions stand, then there is in fact no vehicle whatsoever available for petitioner to have his constitutional claims determined.

that there is no relief available to him in Maine* He has taken his case to the First Circuit, which apparently holds that there is no place (except perhaps California) where habeas corpus will lie. He has then gone to the state where he is presently under charge, and the Federal District Judge in California has said that his remedy is in Maine. The Ninth Circuit Court of Appeals has not spoken definitely as to why habeas corpus will not lie in the Federal Court in California, although it finds that "petitioner is lawfully in custody charged with a federal crime and awaiting trial upon that charge." We think its opinion means that there is some additional "custody" required for habeas corpus.

This course of events is indeed hard to square with what this Court said in *Peyton v. Rowe, supra,* 88 S. Ct. at 1554, that:

> "a principal aim of the writ is to provide for swift judicial review of alleged unlawful restraints on liberty . . . Common sense dictates that [persons] seeking habeas corpus relief after exhausting state remedies should be able to do so at the earliest practicable time."

1. The question is important.

However the question of whether there is any court in the United States in which a person may obtain by habeas corpus review of the validity of a conviction after he has served his sentence is to be decided on the merits, it is obviously important. We hesitate to speculate as to the volume of such cases; it is large. Even if the Court should limit the right of such review to situations, like the present, in which there is some immediate danger as a result of an earlier conviction, the number, again unknown, will still be substantial.

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* The opinion of the Maine District judge, resting on *Ahrens v. Clark,* 335 U.S. 188 (1948); *Parker v. Ellis,* 362 U.S. 574 (1960); *Duncan v. Maine,* 195 F. Supp. 199 (D.Me. 1961), cases relating to the geographical reach of the writ, seems to us to suggest that California rather than Maine is the locale of the custody; and the First Circuit Court of Appeals assumed but did not decide that the requisite custody was in California.

The narrow issue in *Rowe* was whether habeas corpus would lie to challenge a sentence which had not yet begun, a question which was answered in the affirmative. The narrow question in *Carafas* was whether habeas corpus would lie to review a past conviction when the petition for the writ had been filed while the petitioner was in custody but his sentence had expired while the matter was pending, and again the question was answered in the affirmative. There is a third theme in a trilogy of alternatives (sentence in the future, sentence in the past but petition filed before its expiration, and sentence in the past, petition filed after its expiration) which is this case. Every factor which made the first two important in the administration of justice makes the remaining question equally as important. The other two questions having been decided, it is essential to the reasonable administration of justice that the third be decided one way or another.

As the First Circuit fairly says, there is a square question of whether petitioner is in "custody" as required by 28 U.S.C. §2241(c). Functionally, this is simply another aspect of the question of mootness. If there was custody in *Carafas* and in *Rowe*, there is custody here. Can a person never get post-conviction review if he has paid a penalty other than being jailed? Indeed, the Ninth Circuit in so many words said that "petitioner is lawfully in custody."* The sound approach is that of this Court in *Sibron v. State of New York*, 390 U.S. ____, 88 S. Ct. 1889, 1896 (1968):

> "On numerous occasions in the past this Court has proceeded to adjudicate the merits of criminal cases in which the sentence

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* There is a further question as to custody, stemming from the fact that petitioner is on bail in the California proceedings. The First Circuit assumed that this was custody for purposes of habeas corpus, but certainly did not so decide; it implied that the custody was insufficient by citing its own decision in *Allen v. United States*, 349 F.2d 362 (1st Cir. 1965), which holds that a person on bail is not in "custody." See to the contrary, however, *Duncombe v. State of New York*, 267 F. Supp. 103, 109 (S.D.N.Y. 1967); and see *Walker v. North Carolina*, 262 F. Supp. 102, *aff'd.* 372 F.2d 129 (4th Cir. 1966), *cert. den.* 388 U.S. 917, holding that a suspended sentence is custody.

had been fully served or the probationary period during which a suspended sentence could be reimposed had terminated [citing cases]. Thus mere release of the prisoner does not mechanically foreclose consideration of the merits by this Court."

2. Review is warranted to resolve conflicts.

(a) There are conflicts in the decisions of the Ninth and First Circuits. (1) The Ninth Circuit says "petitioner is lawfully in custody"; the First Circuit implies he is not "in custody" at all. (2) There is conflict between the Maine Federal Court's holding that there was no geographic jurisdiction in Maine; and the California District Court's holding that there was jurisdiction only in Maine. (3) In both Circuits, petitioner contended that one reason why there must be a remedy of habeas corpus was that otherwise he would be totally remediless to challenge the validity of the conviction which is the predicate of the charge against him. The First Circuit certainly suggests that this is not so and that petitioner might make a defense under *Burgett v. Texas*. The Ninth Circuit District Court has expressly rejected this, and the Ninth Circuit Court of Appeals has declined to correct him, stating that, if the District Court errs, he can be corrected upon appeal.

(b) In the narrow sense of their holdings, the decisions of the two Circuits do not conflict with *Carafas* and *Rowe;* but while a distinction can be made, certainly the conflict with the spirit, policy, and general language of those decisions is apparent. We append as Appendix H a series of pertinent quotations from *Rowe* and from *Carafas*. In *Rowe*, this Court noted that even *McNally v. Hill*, 293 U.S. 131, 55 S. Ct. 24, 79 L. Ed. 238 (1934), which was overruled, had the saving grace that it suggested some other route by which the remedy could be obtained; here there is nothing. In *Rowe* this Court said that "common sense dictates that prisoners seeking habeas corpus relief after exhausting state remedies should be able to do so at the earliest practicable time." 88 S. Ct. at 1554. Here the time is apparently never.

In the companion petition for certiorari to the Maine Supreme Judicial Court, the Maine Attorney General resists the writ on the ground that there is an adequate remedy in the federal prosecution because the validity of the Maine conviction may be put into issue in the criminal case: "Petitioner's remedy at law is found in *Burgett v. Texas,* 389 U.S. 109." (Brief, State of Maine, No. 203, October Term, 1968, p. 5). The First Circuit suggests, though it does not decide, the same thing. The District Judge in California says that there may be no *Burgett* hearing because the validity of the Maine conviction is immaterial. The Ninth Circuit reserves the right to decide that question on appeal, after conviction.

But we are asking for habeas corpus, supposedly the most "right now" of all legal procedures. Habeas corpus cannot be denied simply on speculation that, after a long and costly litigation with appeals, the same ultimate question may possibly be reached. Moreover, even when the validity of the conviction is determined for purposes of the Federal Firearms' charges, there is no assurance that the conviction itself can be set aside. The only effective way to accomplish that is through immediate habeas corpus review.

We rely especially on the language in *Carafas* holding that the case was not moot simply because the sentence had expired:

> "It is clear that petitioner's cause is not moot. In consequence of his conviction, he cannot engage in certain businesses; he cannot serve as an official of a labor union for a specified period of time; he cannot vote in any election held in New York State; he cannot serve as a juror. Because of these 'disabilities or burdens [which] may flow from' petitioner's conviction, he has 'a substantial stake in the judgment of conviction which

survives the satisfaction of the sentence imposed on him.'" (Footnotes omitted). 88 S. Ct. at 1559.*

Every one of these factors applies equally to the petitioner here. There is a further factor—this petitioner is immediately subject to a criminal prosecution, and meanwhile is restricted in his freedom to ship firearms, a freedom enjoyed by citizens who have not been subject to invalid convictions. Concretely and specifically, the petitioner by his inability to get a writ of habeas corpus is barred from pursuing his intended livelihood as a collector and trader of firearms. As in *Carafas*, the petitioner has followed the long path and he is entitled to get relief *somewhere;* he should not be left as a second class citizen pending a long course of litigation.

The decision below also conflicts with the policy of this Court as expressed in *Sibron v. New York, supra,* 88 S. Ct. at 1899, where this Court stated:

> "The question of the validity of a criminal conviction can arise in many contexts, compare Burgett v. Texas, 389 U.S. 109, 88 S. Ct. 258, 19 L. Ed. 2d 319 (1967) and [the] sooner the issue is fully litigated the better for all concerned. It is always preferable to litigate a matter when it is directly and principally in dispute, rather than in a proceeding where it is collateral to the central controversy."

(c) The Supreme Court of California has recently held in a comprehensive opinion that a person in prison under a second offender statute may by habeas corpus challenge the validity of an earlier conviction to determine whether it was obtained with proper regard for his right to counsel; *In re Caffey,* Crim.

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* This language of the Court in *Carafas* echoes the then minority position of Chief Justice Warren in *Parker v. Ellis,* 362 U.S. 574, 593, 80 S. Ct. 909, 4 L. Ed. 2d 963 (1960) where he stated:

"Conviction of a felony imposes *status* upon a person *which not only makes him vulnerable to future sanctions through new civil disability statutes, but which also seriously affects his reputation and economic opportunities.*" (Emphasis added).

No. 11761, June 25, 1968.* It concluded that "petitioner is entitled to a hearing to determine whether he was denied the right to counsel at the proceeding in 1943," and on another conviction, and that if these are found invalid, the trial court "must disregard both prior convictions in redetermining petitioner's sentence." The opinion fully develops that "token presence of counsel," or a "sham" appearance would render the earlier convictions "devoid of constitutional support," precisely what we contend applies here. It held that "ordinarily" a defendant should "raise a constitutional issue by a pretrial motion to strike the prior convictions from the information or indictment," which is precisely what Thoresen did and was denied here; but it also held that a failure to pursue these remedies "could not constitute a waiver of the right to a hearing in this case. . . ."

In short, California recognizes the right to attack by habeas corpus the validity of a prior conviction which bears on sentence, even though the matter could have been raised at the later trial; the Ninth Circuit holds the opposite, that habeas corpus is unavailable and that the issue can *only* be raised at the second trial, if at all. Surely it can make no difference for purposes of habeas corpus jurisdiction whether the relevance of the earlier conviction is to the length of the sentence, as in *Caffey*, or to the existence of the crime, as here. Under *Caffey*, petitioner could challenge the validity of the earlier conviction *after* he is imprisoned under the Federal Firearms Act; it is inconceivable that the law of habeas

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*See also *Green v. State*, 237 A.2d 409, decided by the Maine Supreme Judicial Court on Januray 23, 1968, holding that the Maine post-conviction remedy statute was available to a Maine prisoner to contest the validity of a prior Maine conviction which had caused his second sentence to be enhanced: "the sentence he is now serving being directly attributable to the enhancement of the larceny sentence by application of the recividist statute, he is entitled to the benefits of our post-conviction statute." 237 A.2d at 411. On the merits, the court found the petitioner's rights under *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963) had been violated and ordered that he be discharged.

corpus jurisdiction would require the extraordinary circuity of barring him from the remedy until after the second conviction.*

CONCLUSION

We realize that there are of course substantial questions as to the nature of the "custody" requisite for habeas corpus purposes, and that there are substantial questions of the geographic reach of the writ. All we need assert here is that these are important questions. It is simply no answer to say, as has the Ninth Circuit Court of Appeals, that perhaps these matters can be raised in some kind of a defense on appeal after a criminal trial. The court has persisted in this position, despite the clear and unequivocal language in *Burgett v. Texas, supra,* that:

> "To permit a conviction obtained in violation of *Gideon v. Wainwright* to be used against a person either to support guilt or enhance punishment for another offense (see Greer v. Beto, 384 U.S. 269, 16 L. Ed. 2d 526, 86 S. Ct. 1447) is to erode the principle of that case. Worse yet, since the defect in the prior conviction was denial of the right to counsel, the accused in effect suffers anew from the deprivation of that Sixth Amendment right." 88 S. Ct. at 262.

Petitioner should not be condemned to the physical, psychological, and monetary rigors of an extended trial, and perhaps ex-

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* In the highly analogous multiple offender cases, it has been expressly held that the previous state conviction may be attacked by federal habeas corpus; see *United States ex rel Savini v. Jackson,* 250 F.2d 349, 355 (2d Cir. 1957), and *United States ex rel LaNear v. Lavallee,* 306 F.2d 417 (2d Cir. 1962). As the court said in Savini: "To the extent that any state makes its penal sanctions depend in part on the fact of prior convictions elsewhere, necessarily it must assume the burden of meeting attacks on the constitutionality of such prior convictions." In *Oyler v. Boles,* 368 U.S. 448, 453-54, 82 S. Ct. 501, 7 L. Ed. 2d 446 (1962), this Court utilized a habeas corpus proceeding to consider issues relating to the validity of a previous conviction in a recidivist case.

tended proceedings on appeal before the validity of the conviction can be affirmed. If he is unconstitutionally subjected to the limitations enumerated in *Carafas*, he is entitled to have that question determined *now*, and not countless thousands of dollars and countless years from now. The only effective way to accomplish this is through immediate habeas corpus review.

> "If [petitioner's] contention be true in fact, it necessarily follows that no legal procedural remedy is available to grant relief for a violation of constitutional rights, unless the court protects petitioner's rights by habeas corpus. Of the contention that the law provides no effective remedy for such a deprivation of rights affecting life and liberty it may well be said—as in *Mooney v. Holohan*, 294 U.S. 103, 113, 55 S. Ct. 340, 342, 79 L. Ed. 791, 98 A.L.R. 406—that it 'falls with the premise.' To deprive a citizen of his only effective remedy would not only be contrary to the 'rudimentary demands of justice' but destructive of a constitutional guaranty specifically designed to prevent injustice." (Footnotes omitted). *Johnson v. Zerbst*, 304 U.S. 458, 467, 58 S. Ct. 1019, 1024, 82 L. Ed. 1461 (1938).

We respectfully submit that the petition for the writ of certiorari should be granted.

Respectfully submitted,

LEWIS ROCA BEAUCHAMP & LINTON

By .....

John P. Frank
John J. Flynn
Richard T. Treon
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OF COUNSEL:

FORD AYER HORAN & LESTER

By .....

Peyton Ford
Urban A. Lester
1000 Connecticut Avenue
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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

WILLIAM E. THORESEN, III
Petitioner,

vs.

THE HONORABLE WILLIAM GOODWIN,
Respondent.

In re Petition of
WILLIAM E. THORESEN, III

No. 22,977

ORDER

Before: MERRILL, KOELSCH and BROWNING, Circuit Judges

Petitioner is lawfully in custody charged with a federal crime and awaiting trial upon that charge. The validity of the Maine conviction may relate to the question of guilt of the federal charge but it does not affect the legality of petitioner's being held to answer to the charge. Trial, and not habeas corpus, is the appropriate manner of resolving the issue of guilt of the federal crime and subordinate issues relating to elements of the crime. If the holding in *Burgett v. Texas*, 389 U.S. 109 (1967), has been erroneously applied by respondent that fact can be raised upon appeal from final judgment. An interlocutory ruling upon the question is not an appealable order and we decline to review the question at this time.

Leave to file petition for writ of mandamus is denied.

Viewing the action of respondent as a denial of a writ of habeas corpus, certificate of probable cause is denied.

These proceedings are dismissed.

CHARLES M. MERRILL

M. OLIVER KOELSCH

JAMES R. BROWNING
Circuit Judges

APPENDIX B

IN THE DISTRICT COURT OE THE UNITED STATES
FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, vs. WILLIAM E. THORESEN, III, and LOUISE B. THORESEN, Defendants.	No. F-196-Cr.

Excerpt of
TRANSCRIPT OF PROCEEDINGS
FRESNO, CALIE.
JUNE 10, 1968

THE COURT: The next matter that should be presented, counsel, concerns the petition for a writ of habeas corpus that was referred to in my oral comments in San Francisco prior to the time that this case was transferred from San Francisco to Fresno.

I think the record should show that based on that oral statement, as I understand it, an application was made to the Circuit Court of Appeals of the Ninth Circuit for a certifiicate of probable cause to appeal from that oral statement. You probably have my letter in which I advised that I was going to make a written order, but you also noted that I made an order in which I refused to rule on that because I had lost jurisdiction. You had presented that to the Circuit and, of course, from the minute you presented it to the Circuit, I had no further jurisdiction. So I refused to make a written order.

But in view of the ruling that the Circuit Court has made in which they denied the certificate, I assume that they viewed my

oral statement as a final order, and now that they have ruled, counsel, it would be presumptuous of me, after having made that oral statement upon which they based their ruling denying your certificate, presumptuous of me to say that the Circuit Court of Appeals should have granted the certificate and heard your argument and requested and directed — I should say by order that I enter a hearing: Isn't that about the situation we are in? How could I go contrary to the Circuit's ruling?

MR. FLYNN: The way I reconstruct what happened, Mr. Frank immediately after sent to Your Honor a form of judgment and a request and application for writ.

THE COURT: A denial of it, is that right?

I would tell you what I was going to say, I wanted to base it on this, my feeling was, No. 1, at that time you were before the Circuit Court of Appeals for the First Circuit on identically the same issue, and I felt that the District Court Judge in San Francisco or from Washington, I guess, I did refer to myself as a sodbuster judge from the little Indian village called Tacoma, I believe that is in the record, anyhow, I have been probably referred to worse than that by some lawyers as they left after receiving an adverse ruling, and I have made that statement myself or worse in the past.

But in any event, Mr. Flynn, the next, the next point after being — my point is I would be presumptuous to rule in a matter where you were before the First Circuit where the Chief Judge — as a matter of fact, the Chief Judge in Boston, Judge Aldrich, he is the one that wrote the order denying a certificate back there, at least, I got a copy of it, for me to make a ruling at the same time that it was before the First Circuit, I thought it would be rather presumptuous. Secondly, my feeling is *Burgett v. Texas* and *Spencer v. Texas* are not in point. The reason I say that, Mr. Flynn, is because there are a number of cases from all the circuits, and the rule of law is generally when a person is under a disability, as a person has been previously convicted of a felony, when a

person is under that disability, the law prohibiting them from doing the certain act does not rely on the question of the validity of the previous conviction any more than a person who is in custody charged with the crime while in lawful custody and makes an escape.

Now, the charge against that person may later be determined that they couldn't sustain it, it was tried out, but they are under a disability when they are under arrest on a charge for which they have been previously indicted.

The cases hold that that person who escapes can not defend successfully on the grounds that the original charge on which he was arrested was not a valid charge. In other words, he escapes because he is under the disability of being indicted. While under that disability, therefore, that is the offense, and I think that the situation here is similar in *Burgett v. Texas* and *Spencer v. Texas,* and that they are not in point, and even though the conviction under our new and enlightened system of rules that have been constantly changing that you are aware of as well as I am, even when that later was voided by virtue of the fact that the contention made that the value of the articles was less than required to constitute a felony, even though it was changed, I wouldn't think that makes any difference in this case. That would be my position. That is what I was going to say in my written order but I never had a chance to say that. You took care of that, you went to the Circuit, and so I was foreclosed.

This is my point and I want it in the record that I was going to do that. Now, I don't need to, they have already determined that for me.

MR. FLYNN: If your Honor please, may I state our position very briefly then in the matter. It simply is as follows, we did receive back from your Honor the judgment and our application for a writ of probable cause on appeal and [un]ssigned with the letter —

THE COURT: I am not critical of you, Mr. Flynn, for going to the Circuit, that is fine. I am not critical at all of you going up to the Circuit before I made the ruling, that is fine.

MR. FLYNN: Then if the Court please, we did have and there was and has been a motion for leave to withdraw the notice of appeal, and it has been signed and ordered by the panel of judges allowing us to withdraw the appeal. That was presented and was executed.

THE COURT: Appeal from what?

MR. FLYNN: From your order, the appeal that was filed, for lack of better description, prematurely.

THE COURT: That is right, but you can't undo — once you ring the bell, you can't unring it, and you rang it in the Circuit and I don't know how you could do that.

MR. FLYNN: I understand, if the Court please, the Court's position completely. I simply wanted to state that motion had been withdrawn and now that your Honor has expressed that what is indicated in your order, I believe it is May 27 —

THE COURT: I did say something about not having jurisdiction at that time.

MR. FLYNN: That's correct, you did not yet at the time of the filing of the appeal enter an order — or in fact expressly ruled on the habeas corpus because of the pendency of the First Circuit.

THE COURT: That's right.

MR. FLYNN: And Your Honor has indicated that you have a copy of the First Circuit decision in which they indicate in their opinion without passing judgment on it —

THE COURT: I just don't think that Burgett and Spencer are in point.

MR. FLYNN:

And the only argument I would have to make is to draw a strong distinction between the question of a person in custody, whether the arrest be lawful or unlawful, as distinguished from a prior conviction.

Now, Your Honor knows from the prior proceedings and the value of the pictures, you didn't really see how it would make a difference —

THE COURT: What is that?

MR. FLYNN: The value of the pictures taken in Maine, and, even if you were to demonstrate they were not a value sufficient to constitute a felony, it really wouldn't make any difference.

There is the second and I think far and away the most serious problem and that is that he has alleged consistently that he was denied the right to be represented by counsel assured to him under the Sixth Amendment to the Constitution, that that original —

THE COURT: Do you mean that that original proceedings — my understanding was, as you relate them, was that he had an attorney but his father came in and discharged him or something of that character.

MR. FLYNN: That is correct, and that then induced the prosecuting attorney in the whole handling before Your Honor, it is in the affidavit we have submitted—[sic]

THE COURT: I understand what your point is in that regard.

Let me give you an illustration. Let me ask you what your attitude is, assume that a person is charged and convicted of an offense, later on appeal the case is reversed because the trial judge failed to sustain a motion to supress certain evidence so that the conviction would be later voided because of the Constitutional problem, but while that conviction and before it had been reversed first under that disability has in its possession a fire arm, [sic] in violation of most state laws that prohibit ex-convicts to possess fire arms, would it then be your contention that you first before trying

the case concerning the violation of the provision of law, an ex-convict's possession of fire arms, you would have to try out the question of the validity of the previous conviction, and you know how long that would take. You could go through the State Court, the Appeal, then your petition for writ of habeas corpus, then you hit the Federal Court, first the Federal District Court then the Circuit Court, and sometimes it comes back down again and back up again something like what someone has described as a yo-yo, until finally four or five years later it would be determined whether or not that conviction was a valid one, so that you could proceed with a prosecution of the violation of the State Statute. I don't believe that is the law.

MR. FLYNN: Except I would only point out that I would think that is almost precisely what Chief Justice Warren says in his concurring opinion in Burgett that you cannot take an original unconstitutional conviction to compound this and say we put you under disability, we Constitutionally violated your rights in the first instance, but, nonetheless, we have the right to restrict you, and then if you do certain acts, say, you committed a crime, and I think that is the thrust of this, I understand Your Honor's position, I certainly don't intend to belabor it —

THE COURT: You agree with the majority in *Spencer v. Texas* and, of course, the Chief Justice was in the minority in that case, but I don't think even that case is in point.

All right.

MR. FLYNN: I would like to do this, and I would like to request of the Court to combine what I would like to make as an offer of proof in relation to habeas corpus, that we be allowed to proceed with what I would anticipate doing in the trial at the time the government offers, as I assume they will in evidence, a certified copy of the Maine conviction, we would at that time request Your Honor for hearing as to the validity of that conviction substantially the same as we would on habeas corpus

and with the permission, in order to facilitate this, if I make this one package, one offer, then I won't have to burden the Court during the trial.

THE COURT: All right. In other words, at that time you would like to have a hearing of the same character that would have been held if hearing was held on the original petition, is that right?

MR. FLYNN: Precisely. My reason for doing it at this time, I do have three gentlemen, four gentlemen from Maine and Canada and for the record I would simply like to have each one stand and acknowledge that he is the named person, for the record, that if such a hearing were allowed or held, they are here to testify, and he will concur in his affidavit, number one, and those who do not have affidavits, that they would be called to testify in support of the affidavit of William E. Thoresen the Third on his application for writ of habeas corpus.

THE COURT: Well, you can make that statement that you have these people here.

Mr. Ladar?

MR. LADAR: I was going to say that much is adequate but, of course, when we get —

THE COURT: I don't want to hear any factual statements from any of these people because, number one, the Circuit Court of Appeals have already acted, both Circuits, the First Circuit, Judge Aldrich, the Ninth Circuit, I guess it is Judge Merrill, who is the senior judge on the panel —

MR. LADAR: Yes, Your Honor, Judge Merrill of the Ninth Circuit, and in respect of the Third Circuit I was just going to say, Your Honor, that that was the entire court in the Third Circuit —

THE COURT: The Third Circuit?

MR. LADAR: The First Circuit, pardon me, that acted upon it.

THE COURT: All right.

MR. FLYNN: I would simply want to name them and identify them.

THE COURT: You can recite the names and I will take your word for it and the record will so show.

MR. FLYNN: May the record show that Mr. William E. Fenton of Bar Harbor, Maine is present in the courtroom, he just stood, and he was the counsel referred to in the affidavit of William E. Thoresen the Third.

MR. FENTON: No middle initial.

MR. FLYNN: He would be called in support of that affidavit.

Also there is Mr. Kenneth Blaisdell, who is the attorney — who was the prosecuting attorney in the Maine proceedings that was set forth in the affidavit, he is in the courtroom and has stood.

Also there is Mr. Everett Liscomb, who is the affiant to one of the affidavits in relation to the ferry boat posters at the time and circumstances, and Mr. Harold Hampton of the Canadian National Railway, and may the record show he has with him the documents by way of verification and to the value if he were allowed to testify.

Further, if the Court please, one other witness who is not here but will be available this afternoon is Mr. William E. Thoresen, the father, whose affidavit is also appended to the application of writ of habeas corpus, and we would, if the Court please, had the hearing been allowed, called as a witness in the case the wife, Louse Thoresen, who has already submitted an affidavit in support of the petition to affirm the allegations in the affidavit.

MR. LESTER: Excuse me, Your Honor, I am not a party to this particular proceedings, but I want the record to show that

I would object to his calling my client, Mrs. Thoresen, in this hearing.

THE COURT: Well, in view of the fact that we are not going to have the hearing, I don't think that there is any necessity of registering an objection, counsel. That would be an exercise of futility for me to rule on an objection when we aren't even going to have the hearing.

MR. LADAR: In the names given, I thought I got them all, was the name of the attorney who represented Mr. Thoresen throughout the plea and sentencing in open court mentioned?

MR. FLYNN: William Fenton.

MR. LADAR: And our position with respect of what he has said, and I have in mind Your Honor's statement that there probably would not be a hearing, is that the fact that they are here doesn't help us, and if it should develop that some point is necessary to inquire into about them, that they either ought to be held here until the trial is over or excused. I can't accept — .

THE COURT: I just don't think that it is necessary, unless they are on vacation and want to stay here voluntarily, to keep them here, counsel, because I don't propose to have the hearing.

MR. LADAR: I am not in a position of having to examine them, and in that case I would not care. But I am indicating I never talked to them and cannot rely upon affidavits.

THE COURT: I understand that.

Now, go ahead, Mr. Flynn.

MR. FLYNN: As I understand it, if Your Honor please, and I did bring with me in anticipation, a judgment denying the application for writ of habeas corpus. But as I understand, Your Honor, that is now unnecessary?

THE COURT: I just don't think that I could deny or affirm or do anything now because the Circuit has ruled.

MR. FLYNN: That is, Your Honor, simply the Circuit having ruled on the original matter?

THE COURT: That's right. I am without jurisdiction to make any ruling at all.

MR. FLYNN: I wonder if I might have just a moment to review my documents?

THE COURT: I think we will take a recess at this time.

* * *

THE COURT: Gentlemen of the Press, you can sit on the front bench if you desire. The only reason I asked the Law Clerk to advise you to be back there is because during jury selection time, the way we are going to proceed would require that prospective jurors sit up there. So if you want to move up and sit on the front bench, that is perfectly all right.

Now, Mr. Flynn?

MR. FLYNN: Yes. If the Court please, I have a matter for the record that I wanted to complete. Earlier this morning I indicated to you that at the time of the habeas corpus we had filed a motion for leave to withdraw the notice of appeal, and that this had been ordered by the panel of judges, Judge Merrill, Judge Koelsch, and Judge Browning. I would like to introduce that in evidence in support of that. At this time I hand up to your Honor —

THE COURT: When did that order come down? Was that after they had previously denied your Certificate?

MR. FLYNN: Yes, it was on June 4th; I believe the certificate was denied —

THE COURT: Yes, the record should reflect that.

MR. FLYNN: Also at this time I would hand up to Your Honor a judgment denying the application for writ of habeas corpus, however I understand Your Honor's position, you take

the position there is no jurisdiction to grant it or deny it at this time.

THE COURT: That is right, I do take that position. I have already stated that it would be a very innocuous document if I signed it, in view of the Circuit's disposition.

MR. FLYNN: Then I would further tender to Your Honor, a denial of an application for a certificate of probable cause, if the Court please, for this proceeding today, assuming that the ruling would be the same.

THE COURT: As I understand it, the Circuit rule is that in some instances it is not necessary to apply to the District Court for a certificate of probable cause; you can go right to the Circuit Court, which you did in this instance, so that would be in the same category as my having entered an order denying it.

MR. FLYNN: Then the Court takes the position, so I understand it, that there simply is no jurisdiction presently to execute these documents, and no need for them at the present time.

THE COURT: That is right, in accordance with my understanding of what the Circuit did, and all I have is a copy of their order that was forwarded to me. What is your position, Mr. Poole, in this regard?

MR. POOLE: As I understand it, what Mr. Flynn is talking about at this time relates to an application to Your Honor for a certificate of probable cause.

THE COURT: That is one thing, and another is a ruling on the question of whether or not a hearing should be held on the defendant's petition for a writ.

MR. POOLE: Your Honor has done this already.

THE COURT: Well, not only that, but the Circuit has already acted.

MR. POOLE: That is what I understood, Your Honor denied — the defendant applied to the Court for a certificate of probable cause, that was denied, and he filed a petition, an application in the Court of Appeals to the Ninth Circuit for a hearing on this, he had his hearing —

THE COURT: No, I didn't deny his certificate of probable cause, he didn't make that application to me, they went directly to the Circuit, which they can do.

MR. POOLE: Yes, because it isn't necessary to apply to Your Honor.

THE COURT: That is right. Do you agree with me?

MR. POOLE: Yes, Your Honor.

THE COURT: I was going to say, if you didn't, I would hear further on it. But if you agreed with them —

MR. POOLE: Not very often, Your Honor.

THE COURT: If you agreed with them, I would be in a difficult position.

DOCKET SHEET

6/10/68

* * *

"Motion for petn for writ of H/C is argued & ordered sd motn denied on basis that defts had previously appealed to circuit court & circuit court having ruled, district court has no jurisdiction."

APPENDIX C

SUPREME COURT OF THE UNITED STATES

No. ————————, October Term, 1968

WILLIAM E. THORESEN, III, Petitioner.

vs.

THE HONORABLE WILLIAM GOODWIN

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner and of the opposition of the respondent thereto,

IT IS ORDERED that the trial of the petitioner set for 10:00 A.M., on June 25, 1968, in the United States District Court for the Eastern District of California, be, and the same is hereby, stayed pending the timely filing of a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in the above-entitled case. Should such a petition be so timely filed, this stay is to continue pending this Court's action on the petition. In the event the petition for a writ of certiorari is denied, this stay is to terminate automatically. Should the petition for a writ of certiorari be granted, this stay is to remain in effect pending the issuance of the judgment of this Court.

Wm. O. Douglas

Associate Justice of the Supreme Court of the United States.

Dated this 25th
day of June, 1968.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Misc. No. 263.

In the Matter of
WILLIAM E. THORESEN, III, Petitioner.

Opinion on Application for Certificate of Probable Cause to Appeal

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Before Aldrich, Chief Judge,
McEntee and Coffin, Circuit Judges.

Gene Carter, John P. Frank, John J. Flynn, Eliot Feldman, Rudman, Rudman, & Carter and Lewis, Roca, Beauchamp & Linton on application for petitioner.

May 13, 1968.

ALDRICH, *Chief Judge.* This is a request for a certificate of probable cause for appeal from an order of the District Court for the District of Maine dismissing an application for a writ of habeas corpus for lack of jurisdiction. A somewhat detailed recitation of facts is called for.

In September 1959, when petitioner was 21 years old, he stole six posters from the Bar Harbor, Maine, terminal of the Canadian National Railway's Nova Scotia ferry. He was apprehended and jailed for want of bail. Thereafter he waived indictment. The waiver which he executed recited that he was

charged with "[l]arceny of goods having a value in excess of One hundred dollars." On the same day he pleaded guilty to an information in which the posters were assigned individual values, totalling an "aggregate value of one hundred and fifty dollars." Between the date of his apprehension and the date of his plea, a period of some ten days, petitioner was continuously in jail. According to affidavits accompanying the present application the following events occurred.

Petitioner employed an attorney, who in turn made contact with petitioner's father. Upon his arrival the father essentially discharged the attorney and conducted lengthy negotiations with the district attorney in the absence of counsel. The father brought with him funds sufficient to bail petitioner, but did not bail him. He informed the district attorney that he was worried about petitioner and thought that he should be treated in a mental institution; that he did not want the petitioner to know that this was the father's proposal, and that he did not want petitioner fined, but thought it best that he receive a suspended sentence and probation, as a result of which, if petitioner was released forthwith, he could return to his home in Illinois for treatment, but be under the custody of the court. After some difficulty the petitioner's father and the district attorney persuaded petitioner to plead guilty, the father informing petitioner that everything would be all right, and that he was only pleading to a "misdemeanor type" offense. Thereafter petitioner pleaded guilty, as aforesaid. He received a two-year suspended sentence, and in 1961 was discharged from the terms of his probation.

Petitioner is presently a resident of California. In 1967 he was indicted in the United States District Court in California for transporting firearms in interstate commerce having been previously "convicted of a crime punishable by imprisonment for a term exceeding one year." 15 U.S.C. § 902(e). The prior conviction relied upon is that just described. Investigation by

petitioner's counsel revealed the foregoing facts, and revealed, further, that the Canadian National Railway had paid a small sum for the posters in question, $2.25 apiece for five and some $15 for the sixth, from which it could fairly be said that by no possibility was the stolen property of a value in excess of $100. Accordingly, the larceny to which petitioner had pleaded should not have been so described, and petitioner was not in fact guilty of an offense within the ambit of section 902(e).[1]

On this basis petitioner sought postconviction relief in the State of Maine. The Maine Supreme Judicial Court dismissed for lack of jurisdiction, holding that the only relief open in that state is under its habeas corpus statute; that habeas corpus is not available when the petitioner is no longer in custody, and that no greater rights attached to the petitioner, so far as the Maine courts were concerned, by virtue of the California proceedings. The present application was then filed in the district court, and dismissed for want of jurisdiction. The district court having declined to issue a certificate of probable cause for appeal, our sole present question is whether that declination was proper.

Petitioner's difficulty is his inability to demonstrate the "custody" required by 28 U.S.C. § 2241(c) before the writ of habeas corpus can issue, a problem pointed up by his failure to name a respondent against whom the writ is to issue. We do not have merely the situation which moved a minority of the Court in *Parker v. Ellis*, 1960, 362 U.S. 574, 577 and 595 (dissenting opinions), where custody terminated during the pendency of the action, see, also, *Thomas v. Cunningham*, 4 Cir., 1964, 335 F.2d 67; here there was no custody—at least so far as Maine was concerned—when the application was filed. Ap-

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[1] Conviction for larceny of goods whose value is less than $100 carries a maximum term of six months. Me. Rev. Stat. Ann. tit. 17, § 2101.

parently petitioner believes that he is contesting a state interest in the light of the fact that he seeks a certificate of probable cause under 28 U.S.C. § 2253. Yet the absence of any respondent has the serious legal consequence that there was no controversy, and the serious practical effect that there was no one to contest.

Petitioner also asserts the custody of the United States in connection with the proceedings pending against him in California.[2] Assuming that this be sufficient custody, *but cf. Allen v. United States*, 1 Cir., 1965, 349 F.2d 362, jurisdiction would not lie in the District of Maine, *Ahrens v. Clark*, 1948, 335 U.S. 188. While we suggest no opinion on the question, even if, as petitioner asserts, there should be nowhere that he may now seek a writ of habeas corpus, it does not necessarily follow that he is remediless so far as defending against the California indictment is concerned. *Cf. Burgett v. Texas*, 1967, 389 U.S. 109. We, of course, express no views as to the applicability of *Burgett*, or whether on the facts alleged petitioner was unconstitutionally convicted.

Certificate denied.

May 24, 1968.

PER CURIAM. On May 20 the Supreme Court overruled *Parker v. Ellis*, 1960, 362 U.S. 574, in *Carafas v. Lavallee*, 5/20/68, and decided *Peyton v. Rowe*, 5/20/68. We have reviewed these decisions and see no reason to alter ours.

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[2] Petitioner urges that he is in a unique position under the statute as his federal custody by virtue of the indictment against him arguably places him "'in custody pursuant to the judgment of the state court' [28 U.S.C. § 2254] since the federal indictment is based upon a 1959 Maine conviction." We do not believe that this novel suggestion as to the meaning of "pursuant to" advances his case.

APPENDIX E

STATE OF MAINE
HANCOCK, SS.

SUPERIOR COURT
DOCKET NO. 1778

WILLIAM E. THORESEN, III
Petitioner

vs.

STATE OF MAINE
Respondents

DECREE

On October 29, 1967, the petitioner subscribed and swore to a petition for post-conviction relief which he states is based upon *coram nobis*, the statutes of the State and the general and equitable powers of the court. It asks that the court declare vacated the petitioner's plea of guilty and conviction in the matter of a charge of larceny which was brought against him by way of an Information in the Hancock County Superior Court in September, 1959. On September 21, 1959, the petitioner was sentenced on the reference charge to the Reformatory for Men and the sentence was suspended and he was placed on probation for a period of two years. His probation was terminated in September, 1961.

The respondent moved to dismiss the petition. Paragraphs 1, 2 and 6 of the motion allege valid grounds for dismissal. However, if I were not required to dismiss the petition on other grounds, I would permit the petitioner to amend to cure these failures to comply with the requirements of the reference rules and statutes.

In my opinion the petition has other, and fatal, defects.

It is evident from the petition that the petitioner is not incarcerated under the sentence which was imposed by the Hancock County Court nor is he still on probation therefor. Therefore, he is not included among the persons to which our post-conviction habeas corpus statute is available. Longway v. State, 161 Me. 430, 231 A. 2d 519 (1965). (The petitioner in his supporting brief argues that as the decision in *Longway* was based on alternative grounds it carried less weight as precedent than would be the case if the fact that the petitioner was no longer serving his sentence was the sole basis for the decision. Our court made clear in Hamner v. State, Me. 233A. 2d 532 (1966) that in such a case when both issues have been fully briefed and argued each ground for the court's decision is entitled to be given full weight as precedent).

In my opinion it was the intention of the legislature in the enactment of Laws of Maine 1963, Chap. 310, An Act Relating to Habeas Corpus and Post Conviction Procedure in Criminal Cases, that this Act should become the sole available vehicle for post-conviction relief in criminal matters.

The history of our post-conviction Act contributes to this conclusion on my part. Post-conviction relief in criminal matters involving alleged errors of fact not of record had been sought very rarely in the courts of Maine until 1956 when our court in Dyer v. State, 151 Me. 382, 120 A.2d 276 made it clear that the common law writ of error *coram nobis* was available in our State in criminal proceedings. In 1961 our legislature enacted Chap. 131 which created a statutory action of writ of error *coram nobis* in criminal matters. Its language was very similar to our present post-conviction statute and it did not supersede the statutory writ of error, which was available only to correct alleged errors of record, and the statutory habeas corpus.

The act of 1963 which has become our present post-conviction statute repealed both the statutory writ of error *coram nobis*

sections (which had become Chap. 126A) and the sections applying to writ of error in criminal matters (Chap. 129, Sec. 11 & 12).

Thus our present act not only states that it was exclusive, but it also removed from the statutes all other available judicial procedures for obtaining the voiding of convictions allegedly unlawfully obtained.

Does the common law writ of error *coram nobis* in criminal matters remain? I think not. Our statute, Sec. 5502, uses what I consider to be unambiguous language.

> ". . . it comprehends and takes the place of all other common law remedies which have heretofore been available for challenging the validity of a conviction and sentence and shall be used exclusively in lieu thereof."

In my opinion our statutory post-conviction habeas corpus statute, 14 M.R.S.A., Sec. 5502 ff., is the only procedure existing in our State for the judicial correction of alleged errors in criminal matters.

In Wood v. State, 161 Me. 13, 206 A.2d 223 (1965) our court spoke of our statutory post-conviction habeas corpus as "providing amongst multiple remedies relief in the nature of habeas corpus and of *coram nobis.*" In Mottram v. State, Me. 232 A.2d 809, our court, in finding that our post-conviction habeas corpus statute was available to a prisoner to test the legality of his return as a parole violator, said:

> "Such interpretation is consistent with the legislative purpose to provide a single exclusive remedy for all collateral attacks on judgments of conviction post conviction as its title indicates. . . . This indicates a legislative intent to include relief beyond the sphere of remedial action provided by the previous habeas corpus, writ of error and common law coram nobis proceedings, which our statutory post-conviction habeas corpus was designed to supplant."

The petitioner argues that even if the legislature did intend to eliminate the use of writ of error *coram nobis* in criminal matters it was not intended that the statute should operate retroactively. Certainly, the passage of the act in question would not affect the rights of a person who had already commenced an action of *coram nobis*—such as the petitioner in Cressey v. State, 161 Me. 295, 211 A.2d 572 (1965). However, in my opinion its language clearly shows the legislature's intention that the common law writ of *coram nobis* as well as the statutory writ of error *coram nobis* should no longer be available in criminal matters after the effective date of the new post-conviction habeas corpus law.

My conclusion is the same as to any equitable powers of the court.

Being a court of first instance, I assume the constitutionality of our statute making post-conviction relief available only to persons who are incarcerated.

Therefore, as the petitioner was no longer incarcerated as a result of the judgment of guilt complained of, his petition is dismissed on its face, and the writ denied.

Dated: December 4, 1967.

Randolph A. Weatherbee
Associate Justice, Supreme Judicial Court
Sitting in the Superior Court

APPENDIX F

WILLIAM E. THORESEN, III

v.

STATE OF MAINE

Supreme Judicial Court of Maine

March 18, 1968.

Before WILLIAMSON, C. J., and WEBBER, TAPLEY, MARDEN, DUFRESNE and WEATHERBEE, JJ.

WEBBER, Justice.

This was a petition for post conviction relief. A motion to dismiss filed by the respondent was granted below. Dismissal was predicated upon the fact that the petitioner is not now under any actual or technical restraint in Maine. On appeal we look to the allegation of the petition to ascertain whether or not it recites valid facts which, if proven, would entitle the petitioner to relief.

The petition asserts that in 1959 the petitioner was arrested and charged with larceny of pictures. Petitioner employed an attorney to represent him. Thereafter petitioner elected to plead guilty to an information charging him with the larceny of six pictures, each separately described and valued, but "all in the aggregate value of one hundred and fifty dollars." He was thereupon sentenced as for a felony but the sentence was at once suspended and he was placed on probation for a period of two years. He was permitted to leave the State of Maine. The terms of his probation were properly complied with and the probation was formally terminated by the Superior Court in 1961. In 1967 the petitioner was indicted in the Federal District Court in Califronia for an alleged violation of Title 15, U.S.C., Sec. 902 (e). An element of the crime charged is that the petitioner is a person previously convicted in Maine of a crime punishable by a prison

term in excess of one year. In order to set aside the Maine conviction, petitioner now seeks an opportunity to prove that the pictures stolen in Maine in 1959 had a value not in excess of twenty-six dollars and that this fact was then unknown to petitioner. In effect petitioner seeks to prove that he did not know or understand that he was pleading guilty to a felony and would not have so pleaded if he had understood the nature of the charge.

By P.L.1963, Ch. 310, Sec. 1 the Legislature enacted a comprehensive relief statute which now appears in the statutes at 14 M.R.S.A. §§ 5502 to 5508 inclusive. That this remedy was intended to be the sole and exclusive method of collateral attack upon the legality of a conviction and sentence was clearly stated by the statute itself. § 5502 provides in part:

> "The remedy of habeas corpus provided in sections 5502 to 5508 is not a substitute for nor does it affect any remedies which are incidental to the proceedings in the trial court, or any remedy of direct review of the sentence or conviction but, except as otherwise provided in sections 5502 to 5508, *it comprehends and takes the place of all other common law remedies which have heretofore been available for challenging the validity of a conviction and sentence and shall be used exclusively in lieu thereof.*" (Emphasis ours)

Moreover, the remedy formerly afforded by the writ of error coram nobis as understood and recognized in this state was incorporated into Sec. 5502 in these terms, "* * * or that there were errors of fact not of record which were not known to the accused or the court and which by the use of reasonable diligence could not have been known to the accused at the time of trial and which, if known, would have prevented conviction, * * *." We are satisfied that the common law writ of error coram nobis recognized as available to a petitioner under custodial restraint in Dwyer v. State (1956) 151 Me. 382, 120 A.2d 276 ceased to exist when it was superseded by the "coram nobis" statute enacted by the Legislature in P.L.1961, Ch. 131. See Bennett v. State of Maine et al. (1965) 161 Me. 489, 493, 214 A.2d 667, 670. This statute,

then R.S.1954, Ch. 126-A, was in turn repealed by Sec. 5 of P.L.1963, Ch. 310, the chapter which simultaneously enacted the post-conviction relief statute in its present form.

Is the remedy afforded by 14 M.R.S.A. §§ 5502 to 5508 available to a petitioner who admittedly is presently under no form of restraint in Maine? We think not. Sec. 5502 itself limits availability in these terms:

> "Any person convicted of a crime and incarcerated thereunder including any person committed as a juvenile offender, or released on probation, or paroled from a sentence thereof, or fined, * * * may institute a petition for a writ of habeas corpus * * *."

Clearly the statute contemplates either a presently existing actual or physical restraint or a technical hold or restraint which under appropriate circumstances (as for example by violation of probation or parole or non-payment of fine) could be converted to a physical restraint. No doubt the requirement stems from a legislative judgment that litigation must eventually come to an end and the dockets of the court must not be clogged with stale claims. We recognized the statutory requirement when we said in Longway v. State of Maine et al. (1965) 161 Me. 430, 432, 213 A.2d 519, 520, "He has satisfied the sentence imposed for larceny and any issue sought to be raised with respect to the trial upon the larceny indictment is of course now moot." In the very recent case of Green v. State of Maine et al., Me., 237 A.2d 409 (Opinion January 23, 1968) we liberally construed the statute to permit its use by one under actual restraint in Maine in execution of a sentence imposed under the so-called "habitual criminal" statute (15 M.R.S.A. § 1742), it being alleged that there had been an unconstitutional deprivation of counsel at the time of a prior Maine conviction. We held that the existing restraint was "directly attributable to the enhancement of the larceny sentence by application of the recidivist statute." We em-

phasize, however, that in Green there was the presently existing restraint in Maine which the post-convicition habeas corpus statute in clear and unambiguous terms requires as a prerequisite to relief. The absence of any form of continuing restraint in the instant case is fatal to the petitioner's claim.

Appeal denied.

WEATHERBEE, J., did not sit.

DUFRESNE, J., sat at argument but did not participate in this decision.

APPENDIX G

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE
NORTHERN DIVISION

IN THE MATTER OF THE APPLICATION OF WILLIAM E. THORESEN, III Petitioner	Application for Writ of Habeas Corpus CIVIL NO. 1721

ORDER

Upon consideration of the above entitled application for a Writ of Habeas Corpus filed April 2, 1968, I find that I am without jurisdiction to entertain the application for the reason that it appears from the application and its accompanying papers that the applicant is not confined, detained or otherwise restrained of his liberty within the territorial limits of the District of Maine. *Ahrens v. Clark,* 335 U.S. 183 (1948); *Parker v. Ellis,* 382 U.S. 574 (1960); *Duncan v. Maine,* 195 F. Supp. 199 (D. Me. 1961); see *Carbo v .United States,* 364 U.S. 611, 619-620 (1961).

IT IS THEREFORE ORDERED that the application is dismissed and the writ denied.

Dated at Bangor, Maine this 11th day of April, 1968.

/s/ Edward T. Gignoux

Judge, United States District Court

A TRUE COPY
ATTEST: Morris Cox, Clerk
by Deputy Clerk

APPENDIX H

EXCERPTS FROM:

Peyton v. Rowe, 390 U.S....., 88 S. Ct. 1549 (1968).

"The writ of habeas corpus is a procedural device for subjecting executive, judicial, or private restraints on liberty to judicial scrutiny. . . . In England where it originated and in the United States, this high purpose has made the writ the symbol and guardian of individual liberty." 88 S. Ct. at 1551.

"We need not look very far to discover three principal characteristics of the writ as it had developed in the federal courts even before the decision in *McNally.* First, though the writ in England had been utilized largely to secure the admission to bail and discharge of prisoners, its major office in the federal courts since the Civil War has been to provide post-conviction relief. Second, the partial codifications of the common-law writ in England and more recent legislation in this country have contained specific and detailed provisions requiring *prompt* adjudication of the validity of the challenged restraint. See and compare Habeas Corpus Act of 1679. 31 Car. II c.2; Act of February 5, 1867, c.28. 14 Stat. 385; and 28 U.S. C. § 2243. Third, at least tentatively in *Frank v. Mangum,* 237 U.S. 309 (1915), and more clearly in *Moore v. Dempsey,* 261 U.S. 86 (1923), this Court had recognized that a district court was authorized to look behind the bare record of a trial proceeding and conduct a factual hearing to determine the merits of alleged deprivations of constitutional rights—a procedure that reached full flowering in *Johnson v. Zerbst,* 304 U.S. 458 (1938). Thus, by the time *McNally* was decided, the federal writ of habeas corpus was substantially a post-conviction device which could afford prompt adjudication of factual as well as legal issues." 88 S. Ct. at 1552.

"[A] principal aim of the writ is to provide for swift judicial review of alleged unlawful restraints on liberty. Calendar congestion, considerations of federalism, see, *e.g., Fay v. Noia,* 372

U.S., at 415-420; *Ex parte Royall,* 117 U.S. 241 (1886), and the exigencies of appellate review account for largely unavoidable delays in the processing of criminal cases. But the prematurity rule of *McNally* in many instances extends without practical justification the time a prisoner entitled to release must remain in confinement. . . . Common sense dictates that prisoners seeking habeas corpus relief after exhausting state remedies should be able to do so at the earliest practicable time." 88 S. Ct. at 1554.

"But the statute does not deny the federal courts power to fashion appropriate relief other than immediate release. Since 1875, the habeas corpus statute has dictated the courts to determine the facts and dispose of the case summarily, as law and justice require. Rev. Stat. § 761 (1875), superseded by 28 U. S. C. § 2243." 88 S. Ct. at 1556.

Carafas v. Lavallee, 390 S. Ct....., 88 S. Ct. 1556 (1968).

"It is clear that petitioner's cause is not moot. In consequence of his conviction, he cannot engage in certain businesses; he cannot serve as an official of a labor union for a specified period of time; he cannot vote in any election held in New York State; he cannot serve as a juror. Because of these disabilities or burdens [which] may flow from petitioner's conviction, he has a substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed on him. *Fiswick v. United States,* 320 U.S. 211, 222 (1946). On account of these collateral consequences, the case is not moot. *Ginsburgh v. New York,* ..... U.S. ....., ..., n. 2 (1968); *Fiswick v. United States, supra,* at 222. n. 10; *United States v. Morgan,* 346 U.S. 502, 512-513 (1954).

"The substantial issue, however, which is posed by *Parker v. Ellis,* is not mootness in the technical or constitutional sense, but whether the statute defining the habeas corpus jurisdiction of the federal judiciary in respect of persons in state custody is available here.

"The federal habeas corpus statute requires that the applicant must be 'in custody' when the application for habeas corpus is filed. This is required not only by the repeated references in the statute, but also by the history of the great writ. Its province, shaped to guarantee the most fundamental of all rights, is to provide an effective and speedy instrument by which judicial inquiry may be had into the legality of the detention of a person. *See Peyton v. Rowe,* [citations omitted].

"But the statute does not limit the relief that may be granted to discharge of the applicant from physical custody. Its mandate is broad with respect to the relief that may be granted. It provides that 'the court shall . . . dispose of the matter as law and justice require' 28 U.S.C. § 2243. The 1966 amendments to the habeas corpus statute seem specifically to contemplate the possibility of relief other than immediate release from physical custody. At one point, the new § 2244 (b) speaks in terms of 'release from custody or other remedy. See *Peyton v. Rowe, supra; Walker v. Wainwright,* 390 U.S. 335 (1968). Cf. *Ex parte Hull,* 312 U.S. 546 (1941). . . . Petitioner is entitled to consideration of his application for relief on its merits. He is suffering' and will continue to suffer, serious disabilities because of the law's complexities and not because of his fault, if his claim that he has been illegally convicted is meritorious. There is no need in the statute, the Constitution, or sound jurisprudence for denying to petitioner his ultimate day in court.

"This case illustrates the validity of THE CHIEF JUSTICE'S criticism that the doctrine of *Parker* simply aggravates the hardships that may result from the 'intolerable delay[s] in affording justice'. *Parker v. Ellis, supra* 362 U.S. 585 (dissenting opinion). . . . His path has been long—partly because of the inevitable delays in our court processes and partly because of the requirement that he exhaust state remedies. He should not be thwarted now and required to bear the consequences of assertedly unlawful con-

viction simply because the path has been so long that he has served his sentence. The federal habeas corpus statute does not require this result, and *Parker v. Ellis* must be overruled. 88 S. Ct. at 1559—61."

SUPREME COURT, U. S.

FILED

AUG 29 1968

JOHN F. DAVIS, CLERK

No. 349

In the Supreme Court of the United States

OCTOBER TERM, 1968

WILLIAM E. THORSEN III, PETITIONER

v.

THE HONORABLE WILLIAM GOODWIN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

ERWIN N. GRISWOLD,
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FRED M. VINSON, JR.,
Assistant Attorney General,

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In the Supreme Court of the United States

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THE HONORABLE WILLIAM GOODWIN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

In 1959, petitioner entered a plea of guilty in the State of Maine to a charge of larceny of property valued in excess of $100 and was sentenced to two years' probation. The term of probation was successfully completed, and petitioner thereafter settled in California. In June 1967, an indictment was returned in the United States District Court for the Northern District of California, charging petitioner with possessing unregistered firearms, in violation of 26 U.S.C. 5851, and transporting firearms in interstate commerce, having been previously convicted of a crime punishable by imprisonment for more than one year, in violation of 15 U.S.C. 902(e). The indictment

318-220—68

was withdrawn after this Court's decision in *Haynes* v. *United States,* 390 U.S. 85, and on March 6, 1968, a new indictment was returned, limited to ten counts charging violations of 15 U.S.C. 902(e).

Following the first indictment, petitioner initiated a series of collateral attacks on the validity of his State conviction, contending that a recent investigation gave him reason to believe that the value of the property stolen did not exceed $100, and his offense was therefore only a misdemeanor, subject to a maximum sentence of six months' imprisonment. On October 29, 1967, he filed a petition in the Superior Court of Maine seeking a writ in the nature of *coram nobis.* Without considering the merits of the claim, that court denied the petition on the ground that a 1963 statute abolished the writ of *coram nobis* and the relief it comprehended. The court further observed that since petitioner was neither incarcerated nor on probation at the time he applied for relief, he was not entitled to a writ of habeas corpus, the only available post-conviction remedy under Maine law (Pet. App. E). The Supreme Judicial Court of Maine affirmed that decision on March 18, 1968 (Pet. App. F). A petition for a writ of certiorari to review that decision has been filed (No. 203, this Term).

Two weeks after the decision of the Supreme Judicial Court of Maine, petitioner applied for a writ of habeas corpus, attacking his 1959 State conviction, in the United States District Court for the District of Maine. On April 11, 1968, the application was denied for lack of jurisdiction because petitioner was "not

confined, detained or otherwise restrained of his liberty within the territorial limits of the District of Maine". (Pet. App. G). On May 13, 1968, the Court of Appeals for the First Circuit denied a request for a certificate of probable cause (Pet. App. D). Petitioner has also sought review of the First Circuit's decision by writ of certiorari (No. 348, this Term).

Prior to the entry of the First Circuit's decision, petitioner applied for a writ of habeas corpus, again challenging the validity of the Maine conviction, in the United States District Court for the Northern District of California. At a hearing held on May 7, 1968, respondent, Judge Goodwin, orally denied the application, holding, *inter alia,* that petitioner's appeal to the Court of Appeals for the First Circuit, raising the same claim, deprived the court of jurisdiction (Tr. 81, 84–85).[1]

Petitioner filed a notice of appeal from that decision, and the district judge thereafter informed the parties that he would file a written opinion. Prior to the issuance of any written order, petitioner applied for a certificate of probable cause from the Court of Appeals for the Ninth Circuit. On May 28, 1968, the court of appeals denied the application without opinion. Believing that the Ninth Circuit's decision was premised on the fact that the district court's decision, absent a written order, was not final, petitioner then withdrew his notice of appeal, and requested that the

[1] "Tr." refers to the transcript of the pretrial hearing conducted on May 7, 1968, found in volume two of the four-volume record filed with the Clerk of the Court.

district court issue a written order. At a hearing on June 10, 1968, the district court declined to consider the matter further, on the ground that the denial of a certificate of probable cause by the Ninth Circuit removed its jurisdiction to consider petitioner's claim (Pet. App. B, IV R. 18–30). Petitioner then filed in the Ninth Circuit a petition for a writ of mandamus to compel the district court to resolve the issue raised in the habeas corpus petition, or in the alternative, for a certificate of probable cause. On June 19, 1968, the court of appeals denied the petition, stating (Pet. App. A):

> The validity of the Maine conviction may relate to the question of guilt of the federal charge but it does not affect the legality of petitioner's being held to answer to the charge. Trial, and not habeas corpus, is the appropriate manner of resolving the issue of guilt of the federal crime and subordinate issues relating to elements of the crime. * * *

1. The court below correctly held that petitioner's custody in California pursuant to the federal indictment did not support his application for a writ of habeas corpus to challenge the validity of his prior State conviction. Before the indictment was returned in the Northern District of California, petitioner had made no attempt to establish the invalidity of the Maine conviction. The federal indictment was valid on its face, and petitioner does not contend that the

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* On the eve of trial, Mr. Justice Douglas stayed further proceedings in the district court pending this Court's disposition of the petition for a writ of certiorari. Pet. App. C.

district court in which the indictment was returned did not have jurisdiction. Since the district court plainly had the "power and authority" to act (*Harlan* v. *McGourin*, 218 U.S. 442, 448), the restraint imposed upon petitioner as a result of the valid indictment did not provide him with an opportunity to seek release by a writ of habeas corpus that did not challenge the court's jurisdiction. As the court of appeals held, the validity of the Maine conviction had no effect upon the legality of petitioner's being held to answer to the federal charge.

By emphasizing the differences in the rationales of the First and Ninth Circuits in disposing of his applications for habeas corpus, petitioner seeks to present the question whether federal habeas corpus is available to challenge the validity of a State conviction where the application is not filed until long after the State sentence had been satisfied. There is no need, however, to consider that question in the present case. Neither *Peyton* v. *Rowe*, 391 U.S. 54, nor *Carafas* v. *LaVallee*, 391 U.S. 234, on which petitioner relies, suggest that a State conviction is subject indefinitely to attack on federal habeas corpus. Moreover, the basis for petitioner's contention that habeas corpus is an appropriate remedy is the prejudice arising from the pendency of the present indictment and the fear of subsequent prosecutions under the Federal Firearms Act (Pet. 14). Petitioner's prior State conviction, however, is an element of the offenses charged in the federal indictment. Petitioner's contention that he was erroneously convicted of a

felony rather than a misdemeanor in the State court was properly viewed by the court below as a possible defense to that element of the federal charges. Although we do not believe that petitioner's contention constitutes a valid defense to a charge under 15 U.S.C. 902(e),[3] petitioner will have a full opportunity to present that contention at trial, and if the defense is sustained, it will remove the prejudice of which petitioner now complains. See *Burgett* v. *Texas*, 389 U.S. 109. Accordingly, the court below properly held that the assertion of petitioner's alleged defense did not oust the district court of jurisdiction to try the case, nor did it require that the merits of that defense be litigated in a collateral proceeding in advance of trial. See *Stack* v. *Boyle*, 342 U.S. 1; *Whitney* v. *Dick*, 202 U.S. 132.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.
FRED M. VINSON, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
MERVYN HAMBURG,
Attorneys.

AUGUST 1968.

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[3] See *DePugh* v. *United States*, 393 F. 2d 367 (C.A. 8), petition for a writ of certiorari pending, No. 169, this Term; *Laws* v. *United States*, 386 F. 2d 816 (C.A. 10), certiorari denied, 390 U.S. 1007; *United States* v. *Sutton*, 363 F. 2d 845 (C.A. 4), certiorari denied, 385 U.S. 1014.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. 349

WILLIAM E. THORESEN, III,

Petitioner,

vs.

THE HONORABLE WILLIAM GOODWIN,

Respondent.

In re Petition of WILLIAM E. THORESEN, III.

PETITIONER'S REPLY BRIEF

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In re Petition of WILLIAM E. THORESEN, III.

PETITIONER'S REPLY BRIEF

We regret that we have been unable to pursuade the government to discuss either the ultimate or even the immediate issue in this case: In the ultimate sense, is the writ of habeas corpus available in any court, state or federal, to review the validity of a state criminal conviction obtained in violation of federal constitutional rights after the defendant has completely served his sentence or paid his penalty? In the more immediate sense, is the writ available in a federal district court to attack the validity of an allegedly constitutionally deficient prior state conviction where the federal prosecution is dependent upon the prior state conviction as a necessary predicate to the federal charges? Respondent does not deal with the larger question presented; we rest on our full development of the question in the petitions.* Respondent comes to grips only

*The government has not filed a response to the First Circuit Petition (No. 348).

obliquely with the more immediate question presented; in view of the importance of this question to petitioner and indeed to all persons who have been unconstitutionally convicted who are likewise subject to having that injury compounded by further government action, we are compelled to respond.

Petitioner's claims that he was deprived of counsel and that the property he allegedly stole was not of sufficient value to support jurisdiction for a felony conviction stand uncontroverted before this Court. Clearly the more serious of these two deprivations is the denial of right to counsel. In fact, this Court has stated in *Johnson v. Zerbst*, 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1934), that denial of right to counsel:

> "stands as a jurisdictional bar to a valid conviction. . . . If this requirement of the Sixth Amendment is not complied with, the court no longer has jurisdiction to proceed. The judgment of conviction pronounced by a court without jurisdiction is void, and one imprisoned thereunder may obtain release by habeas corpus." 304 U.S. at 468.

The government's response to petitioner's contentions is twofold: first, whatever the teachings of *Peyton v. Rowe*, 88 S. Ct. 1549 (1968), and *Carafas v. Lavallee*, 88 S. Ct. 1556 (1968), one cannot wait indefinitely to attack by habeas corpus an allegedly invalid conviction, and petitioner waited too long; second, once the federal charges were filed in the Northern District, habeas corpus was no longer available because this would constitute a collateral attack on a state conviction, which cannot be done in the federal proceedings. And, in any event, this is all irrelevant because, even if the state conviction was void, under *DePugh v. United States*, 393 F.2d 367 (8th Cir. 1968), petitioner would still be liable under the Federal Firearms Act since the conviction was not attacked and set aside prior to the shipment of firearms.*

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* Petitioner believes that the government's reliance upon *DePugh* is misplaced. *DePugh* did *not* involve an alleged denial of a federal constitutional right, as is alleged by petitioner here. Whatever the ultimate disposition of the issues presented in *DePugh*, a person cannot be constitutionally convicted of a second crime based upon his status where that sta-

With reference to the government's contention that petitioner "waited too long," (which seems to admit, at least impliedly, that *Peyton v. Rowe, supra,* and *Carafas v. Lavallee, supra,* have sounded the death knell to the artificial "custody" requirement of prior decisions), the uncontroverted record demonstrates that petitioner did not realize that he was convicted of a felony until *after* the federal charges were filed.** As to the second contention, petitioner first attacked the Maine conviction in the Maine state and federal courts, the Maine state court holding that state law provided no remedy to review denial of federal constitutional rights after the sentence was served. The First Circuit held that this was also true of the federal courts, suggesting that the only possible place for such a challenge was California where the firearms indictment lay. Petitioner then attacked the conviction in the Ninth Circuit, but was told that no remedy exists in that Circuit either, except perhaps by way of review upon appeal after conviction.

Additionally, both the Ninth Circuit and the government have ignored completely this Court's decision in *Burgett v. Texas, supra,* which implies that a defendant has a right to a hearing *prior to trial* to inquire into the constitutional validity of a prior conviction which is being used as a predicate for a second criminal proceeding or for enhancement of punishment after a second conviction. Re-

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tus has been imposed upon him in a constitutionally defective criminal proceeding. Whatever *DePugh* may or may not stand for, it is clear that under *Burgett* v. *Texas,* 389 U.S. 109, 88 S. Ct. 258, 19 L. Ed. 2d 319 (1967), the government cannot use a conviction secured in violation of a person's Sixth Amendment right to counsel "either to support guilt or enhance punishment for another offense...." 88 S. Ct. at 262.

** The government says: "Before the indictment was returned in the Northern District of California, petitioner had made no attempt to establish the invalidity of the Maine conviction." (p.4). This ignores the fact that there were *two* indictments in the Northern District. The second indictment was not brought until *after* petitioner had begun his attack on the prior conviction. Upon learning of the alleged felony nature of the Maine conviction, petitioner immediately undertook investigation of the factual circumstances and, after securing numerous affidavits tending to establish the invalidity of the conviction, he began post-conviction proceedings in first the Maine state court and then the First Circuit.

spondent's statement that "petitioner will have a full opportunity to present [his] contention at trial" (p. 6), citing *Burgett, supra,* ignores the fact that *Burgett* appears to support a requirement of a hearing *prior to trial* and that the District Court has already denied petitioner such a pre-trial hearing and has strongly indicated that no hearing will be granted at trial. (See App., Br. Pet. p. 22-23).

We believe the decisions of the District Court, the Ninth Circuit and the response of the government in this case are reducible to one basic proposition: Even though the necessary predicate to the federal charge is a prior felony conviction, and even though that conviction may in fact be void, a person cannot stop a federal trial with a writ of habeas corpus, but instead must suffer the second conviction and then attempt to straighten the matter out on appeal. This approach contradicts the history and purpose of the writ of habeas corpus and ignores the Court's decisions in *Peyton v. Rowe, supra, Carafas v. Lavallee, supra,* and *Sibron v. New York,* 88 S. Ct. at 1899.

Petitioner's right to attack by habeas corpus his *status* as a convicted felon (which subjects him right now to all of the disabilities recognized in *Carafas*) is completely independent of his right to attack the conviction in the context of the federal firearms prosecution. *Burgett* is no limitation on the Great Writ. As this Court stated in *Sibron v. New York*:

> "The question of the validity of a criminal conviction can arise in many contexts, compare Burgett v. Texas, 389 U.S. 109, 88 S. Ct. 258, 19 L. Ed. 2d 319 (1967) and [the] sooner the issue is fully litigated the better for all concerned. It is always preferable to litigate a matter when it is directly and principally in dispute, rather than in a proceeding where it is collateral to the central controversy."

Had the courts of Maine and the First Circuit not thought themselves fettered by artificial and outdated concepts of "custody," petitioner would have had an opportunity to prove the constitutional invalidity of the Maine conviction prior to the filing of the second indictment in this case.

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The government states in its brief that petitioner has not directly attacked by habeas corpus the jurisdiction of the District Court to proceed with the Federal Firearms Act charges. While this is true in a technical sense, as a practical matter, petitioner has in fact claimed that the necessary predicate to the federal criminal proceedings—the Maine felony conviction—is void. If the District Court can proceed with the Federal Firearms Act charges when the necessary predicate therefor derives from a void conviction, this petitioner, like *Burgett*, "in effect suffers anew from the deprivation of his Sixth Amendment right." *Burgett, supra*, 88 S. Ct. at 262.

The path for this petitioner, like that of Carafas, has been long; we respectfully submit that law and justice require that he be given a hearing on the merits of his contentions now, not countless thousands of dollars and countless years from now. Habeas corpus means that this petitioner has a right to immediate hearing on his constitutional contentions.

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